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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Appellant,<br>v.<br>HAROLD LAMAR YERGENSON,<br>Defendant and Appellant. | G041321<br>(Super. Ct. No. INF058441)<br>O P I N I O N |

Appeals from a judgment of the Superior Court of Riverside County, Richard A. Erwood, Judge. Affirmed.

Rod Pacheco, District Attorney and Alan D. Tate, Deputy District Attorney for Plaintiff and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Ronald Jakob, Christopher P. Beesley and Pamela Ratner Sobeck, Deputy Attorneys General, for Plaintiff and Appellant.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

* * *

This is both an appeal by defendant Harold Lamar Yergenson and a cross-appeal by the People in this domestic violence case. Defendant argues numerous errors, including the admissibility of the prior conviction for purposes of impeachment as well as instructional error. The People argue that the trial court abused its discretion by striking one of defendant's prior convictions for sentencing purposes and by failing to sentence defendant to two 5-year enhancements that were never charged in the information. We find both defendant's and the People's arguments to be without merit, and affirm.

## I

## FACTS

As of May 2007, defendant and Kamela P. were living together and had been dating for about a year and a half. On the evening of May 16, Kamela had expected to go out with defendant, but he did not arrive. She attempted to call him, and he stated he was on his way. When defendant arrived at home, they began to argue.

The argument escalated when defendant accused Kamela of stealing his keys. He grabbed her by the hair and dragged her upstairs, ordering her to search for the keys. When she could not find them, defendant grabbed her by the hair again and dragged her downstairs. Defendant then began punching Kamela in the face and arms. He shoved her to the ground and kicked her in her head and back. He also grabbed her throat and started strangling her, threatening to kill her and bury her in the desert.

When defendant went to a utility closet, Kamela fled the house. She encountered the apartment manager, Mark Pena, who asked her what happened. He took her to his own home and called the police. Defendant, still in the apartment, had also called the police. The police officer who responded found Kamela beaten, with injuries and bruises to her arms, face, neck and back. She was taken to the hospital for treatment.

The police contacted and arrested defendant. He did not have any noticeable injuries. The home had some broken furnishings and other signs of disarray.

Later, defendant testified that Kamela had attacked him and that any injuries sustained were a result of self-defense.

A records review showed another incident of domestic violence between defendant and Kamela in December 2006. Defendant became enraged by an untidy room in the house, and dragged Kamela by the hair to the driveway. Defendant was combative with the police. Kamela later refused to press charges.

Defendant was charged with one count of corporal injury to a cohabitant (Pen. Code, § 273.5, subd. (a), count one),[1] and one count of criminal threats (§ 422). The information further alleged that defendant had two prior strike convictions within the meaning of the "Three Strikes" law. (§ 667, subs. (c) and (e)(1).) At the conclusion of trial, defendant was found guilty, and the jury also found the allegation of prior strikes to be true. The court struck one of defendant's strike priors and sentenced him to eight years in state prison.

## II

## DISCUSSION

### *A. Defendant's Appeal*

#### *1. Admissibility of Prior Felony Conviction*

Prior to trial, the prosecutor moved to admit defendant's two prior convictions into evidence if defendant testified. The first conviction was for a 1987 involuntary manslaughter conviction. Defendant stated that he had gone to the home of a drug dealer to purchase marijuana, and the drug dealer attempted to sexually assault him. A struggle with the drug dealer's weapon ensued, and the gun went off. The second conviction was for first degree burglary in 2001 to which defendant had pled guilty. While the prosecutor admitted that involuntary manslaughter did not constitute a crime of moral turpitude, he argued that the gun use enhancement did qualify, making the crime as

[1] Unless otherwise indicated, subsequent statutory references are to the Penal Code.

a whole one of moral turpitude. Defendant, for his part, argued the conviction was too remote because it was 20 years old.

The prosecutor responded that the crime was not too stale when defendant's entire history was taken into account. Defendant went to prison for the manslaughter in 1990 and was released in 1994. Within four years, he was convicted of a felony drug crime and went to prison until the end of 1999. He was convicted of burglary two years later and returned to prison in two years. Given defendant's inability to remain law abiding, the prosecutor argued, his manslaughter conviction should be allowed for impeachment purposes. The court agreed.

Defendant now argues that the court erred, as a matter of law, by allowing the involuntary manslaughter conviction to be used for impeachment purposes because it was not a crime of moral turpitude. Defendant also argues that the court abused its discretion under Evidence Code section 352 and violated his federal due process rights.

While Evidence Code section 788 allows any prior conviction to be used for impeachment purposes in criminal proceedings, due process limits felonies that may be used for impeachment to those involving moral turpitude. (*People v. Castro* (1985) 38 Cal.3d 301, 313-314.) On appeal, defendant argues that involuntary manslaughter is not a crime of moral turpitude, and therefore, the trial court erred in allowing it to be used for impeachment purposes. Defendant, however, has not preserved this claim for appeal.

In the trial court, the prosecutor conceded that involuntary manslaughter was not a crime of moral turpitude, relying on the gun enhancement to argue that it was. Defendant did not argue this point, instead relying on his argument under Evidence Code section 352 that the crime was too remote. But "[a] general objection to the admission or exclusion of evidence, or one based on a different ground from that advanced at trial, does not preserve the claim for appeal." (*People v. Marks* (2003) 31 Cal. 4th 197, 228 (*Marks*).) In *Marks*, at the time of trial, the defendant did not argue that the prior convictions the prosecution sought to use for impeachment were not crimes of moral

turpitude. On appeal, he asked the court to consider this issue, but the court found it was waived for failure to properly raise it at trial. (*Ibid.*) Such is the case here. We will consider defendant's argument, properly raised below, that admission of the prior conviction violated Evidence Code section 352. Any question, however, as to whether his prior conviction involved a crime of moral turpitude has been waived.

With regard to Evidence Code section 352, defendant claims that the involuntary manslaughter conviction should have been excluded because any probative value was outweighed by prejudice. (*People v. Cornelio* (1989) 207 Cal.App.3d 1580, 1583.) Specifically, he argues the conviction was too old, stale or remote for impeachment purposes.

We review the court's ruling for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 197; *People v. Lucas* (1995) 12 Cal.4th 415, 448-449.) The trial court's discretion is "is as broad as necessary to deal with the great variety of factual situations in which the issue arises, and in most instances the appellate courts will uphold its exercise whether the conviction is admitted or excluded." (*People v. Collins* (1986) 42 Cal.3d 378, 389.) We may only overturn the trial court's ruling on this matter if it "'falls outside the bounds of reason.'" (*People v. Williams* (1998) 17 Cal.4th 148, 162 (*Williams*).)

In exercising its discretion, the trial court must consider the following four factors: "(1) whether the prior conviction reflects adversely on . . . [the defendant's] honesty or veracity; (2) the nearness or remoteness in time of a prior conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged offense; and (4) what the effect will be if the defendant does not testify out of fear of being prejudiced because of the impeachment by prior convictions. [Citation.]" (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925 (*Mendoza*).)

Defendant's primary contention that the admission of the prior conviction was an abuse of discretion because it was 20 years old, and therefore too remote. We

disagree. "[C]onvictions remote in time are not automatically inadmissible for impeachment purposes. Even a fairly remote prior conviction is admissible if the defendant has not led a legally blameless life since the time of the remote prior. [Citations.]" (*Mendoza, supra,* 78 Cal.App.4th at pp. 925-926.) In *People v. Green* (1995) 34 Cal.App.4th 165, 183, the court admitted a 20-year-old prior conviction. It explained that the defendant's 1973 conviction was followed by five additional convictions in 1978, 1985, 1987, 1988, and 1989. The court reasoned that "'the systematic occurrence of [the defendant's] priors over a 20-year period create[d] a pattern that [was] relevant to [his] credibility.' [Citation.]" (*Id.* at p. 183, first bracketed insertion added.)

Similarly, in *Mendoza,* the court concluded that a 17-year-old conviction was not too remote. The court reasoned that the "defendant ha[d] not led a legally blameless life since 1979, as he had suffered multiple convictions in 1989, 1991, and in 1993. This is so despite the apparent 10-year gap between defendant's 1979 and 1989 convictions. . . . Moreover, defendant's subsequent convictions in 1989, 1991, and 1993 were for theft-related crimes, which are in and of themselves probative on the issue of defendant's credibility. Thus, the remoteness factor would not mitigate against admission of the priors." (*Mendoza, supra,* 78 Cal.App.4th at p. 926.)

Other cases have reached a similar conclusion. In *People v. Muldrow* (1988) 202 Cal.App.3d 636, the court held that it was not an abuse of discretion to admit prior convictions that were 10 to 20 years old. (*Id.* at pp. 647-648.) The court explained that "[t]he combination of the frequency of the convictions, not only from 1965 to 1975 but throughout the 20-year period, plus their relevance to dishonesty, give merit to the prosecution's argument that a jury would 'find the defendant much less credible' knowing that he had not led a law-abiding life since his first felony conviction in 1965." (*Id.* at p. 648, italics omitted.)

As discussed above, defendant was convicted of involuntary manslaughter in 1990, and was in prison until 1994. In 1998, he was convicted of a drug offense, and in 2001, of burglary. Taken together with his subsequent history, the court was well within its discretion to conclude that defendant's involuntary manslaughter conviction was not too remote to be considered relevant in assessing defendant's credibility. We therefore find no error. Because the evidence was properly admitted, we also find no constitutional error. (See *People v. Lindberg* (2008) 45 Cal.4th 1, 26.)

*2. Evidence Code section 1109*

Defendant next argues that the trial court erred in instructing the jury under Evidence Code section 1109 that his prior act of domestic violence could be used to show his criminal propensity to commit acts of violence. Evidence Code section 1109, subd. (a)(1) states, in relevant part: "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

Defendant's first argument is that on its face, Evidence Code section 1109 violates federal due process and equal protection requirements. He admits that other California courts have found this argument without merit, and we need not belabor it here. Evidence Code section 1109 does not violate defendant's federal due process (see *People v. Price* (2004) 120 Cal.App.4th 224, 240; *People v. Johnson* (2000) 77 Cal.App.4th 410, 412) or equal protection rights (see *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310-1313**;** *People v. Price*, *supra*, 120 Cal.App.4th at p. 240).

Defendant next contends that the propensity instruction improperly told the jury that in order to consider the prior domestic violence incident as evidence, the prosecutor had to establish that the act occurred by a preponderance of the evidence. He claims the preponderance of evidence standard improperly diluted the prosecution's burden of proof.

We disagree. The jury was properly instructed on the burden of proof as to the charges in the instant case. Moreover, the California Supreme Court has held that a similar propensity instruction under Evidence Code section 1108 was permissible. (*People v. Falsetta* (1999) 21 Cal.4th 903, 922.) Thus, there was no error.

*3. Instruction on the Victim's Criminal Propensity*

Finally, defendant asserts that the propensity instruction under Evidence Code section 1109 should have applied equally to the victim. Because defendant did not request such an instruction in the trial court, this claim is waived. (*People v. Boyer* (2006) 38 Cal.4th 412, 465.)

*B. People's Appeal*

*1. Abuse of Discretion re Strike Prior*

The first issue raised by the People is whether the trial court abused its discretion by striking one of defendant's priors for sentencing purposes. Prior to sentencing, defendant requested the court strike one of his prior convictions. The prosecution opposed, arguing defendant was within the meaning of the Three Strikes law.

At the sentencing hearing, the court heard argument and statements from defendant's witnesses. Defendant addressed the trial court and apologized for his conduct. The prosecutor read a letter from the victim. The court took a recess to review the exhibits, specifically photographs of the victim's injuries. After returning to the bench, the court stated it would excise its discretion to dismiss defendant's prior manslaughter conviction for sentencing purposes. In a minute order, the court stated that it dismissed the prior strike conviction because the victim's injuries were minor and did not justify a sentence of 25 years to life in prison.

The court sentenced defendant to the upper term of four years, doubled to eight years in accordance with the second strike provision of the Three Strikes law. The People now appeal.

In *People v. Carmony* (2004) 33 Cal.4th 367 (*Carmony*), our Supreme Court summarized the principles applicable to a trial court's ruling on a request to strike one or more prior "strike" allegations under section 1385. "'In *Romero,* we held that a trial court may strike or vacate an allegation or finding under the Three Strikes law that a defendant has previously been convicted of a serious and/or violent felony, on its own motion, "in furtherance of justice" pursuant to . . . section 1385(a).' (*People v. Williams* (1998) 17 Cal.4th 148, 158 . . . (*Williams*).) We further held that '[a] court's discretionary decision to dismiss or strike a sentencing allegation under section 1385 is' reviewable for abuse of discretion. ([*People v. Superior Court* (*Romero*) (1996)] 13 Cal.4th [497,] 531.)" (*Carmony, supra,* 33 Cal.4th at p. 373.)

"'[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, "in furtherance of justice" pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' (*Williams*, *supra,* 17 Cal.4th at p. 161.)" (*Carmony, supra,* 33 Cal.4th at p. 377.)

"In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citations.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized

nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra,* 33 Cal.4th at pp. 376-377.)

The People argue that the trial court "erred as a matter of law" in concluding that injuries to the victim were required in order to justify a sentence of 25 years to life. We disagree with the People that this is, in fact, what the court decided. Rather, a fair reading of the court's comments suggests that the severity of the victim's injuries were but one factor in the exercise of its discretion. The nature of the present felony is one of the factors set forth in *Williams*, and therefore properly considered by the trial court.

The People also argue that the trial court erred as a matter of law in concluding that the victim's injuries were "minor." While we do not minimize the injuries the victim suffered, a word such as "minor" is a matter of relative degree, and could simply indicate that no permanent or long-lasting injury was suffered. In any event, this is a question of fact, and we find no error as a matter of law.

The People next argue that the trial court looked only to the degree of the victim's injuries and not the other factors enumerated in *Williams,* e.g., "the nature and circumstances of his . . . prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects. . . ." (*Williams, supra,* 17 Cal.4th at p. 161.) Simply because the court did not enumerate all of the reasons for its decision in its minute order, we do not find that the court did not consider all of the appropriate factors. Indeed, the sentencing hearing indicates the court did so. The court had briefing from both parties to consider, as well as a probation report. The court also heard from defendant's friends and family, and heard a letter from the victim. Given these circumstances, we find no probability that the court considered only the victim's injuries and not all the appropriate factors under *Williams*.

Indeed, in light of the facts and standard of review, we find no abuse of discretion. The People offer no basis for concluding that the court acted irrationally or arbitrarily. While this court may have reached a different conclusion, on this record, there is no basis for finding that the trial court abused its discretion.

*2. Enhancements*

Finally, the People offer the brief argument that the trial court erred by failing to sentence defendant to two 5-year enhancements under section 667, subdivision (a)(1). That section provides for a five-year sentencing enhancement for each prior serious felony. The People, however, acknowledge that the information did not specifically allege such enhancements in the information, instead alleging enhancements under sections 667 subdivisions (c) and (e).

The People admit while specifically alleging such enhancements in the information "may be the better practice," the People argue it is not really necessary to do so, because the "allegations will be sufficient if the information puts defendant on notice of the charges." We disagree, and the cases the People cite do not support its argument. Indeed, we can find no case that permitted a defendant to be sentenced to an enhancement that was not pled in the information.

The People rely on *People v. Shoaff* (1993) 16 Cal. App. 4th 1112 for the proposition that the factual allegations are sufficient to give a defendant notice of what is being charged, and the facts required for imposition of an enhanced term. In that case, however, the question was whether defendant had notice that he could be convicted of a lesser included offense of the crime charged. (*Id.* at p. 1117.) The facts here are different, and the People are seeking, for the first time on appeal, to sentence defendant to 10 years additional prison time based on an enhancement that was never pled in the trial court.

We find such a request inappropriate as a matter of law. Defendant was entitled, as a matter of due process, to proper notice of all potential sentence

enhancements, and the People were required to prove each one, even if the same facts might apply to multiple enhancements. We therefore find no error in the sentence.

III

DISPOSITION

The judgment is affirmed.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.